

**BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

A-R CABLE SERVICES, INC.
A-R CABLE PARTNERS
CABLEVISION OF FRAMINGHAM, INC.
CHARTER COMMUNICATIONS
GREATER WORCESTER CABLEVISION,
INC.
MEDIAONE OF MASSACHUSETTS, INC.
MEDIAONE OF PIONEER VALLEY, INC.
MEDIAONE OF SOUTHERN NEW
ENGLAND, INC.
MEDIAONE OF WESTERN NEW
ENGLAND, INC.
MEDIAONE ENTERPRISES, INC.
MEDIAONE OF NEW ENGLAND, INC.
PEGASUS COMMUNICATIONS
TIME WARNER CABLE

Complainants,

v.

MASSACHUSETTS ELECTRIC
COMPANY

Respondent.

D.T.E. 98-52

**REPLY BRIEF OF A-R CABLE
SERVICES, INC., ET ALS**

By their attorneys,

William D. Durand	Alan D. Mandl
Executive Vice President and Chief Counsel	Ottenberg, Dunkless, Mandl & Mandl LLP
New England Cable Television Association, Inc.	260 Franklin Street
100 Grandview Road	Boston, MA 02110
Braintree, MA 02184	(617) 261-6566
(781) 843-3418	

Dated: October 5, 1998

TABLE OF CONTENTS

	Page
I. INTRODUCTION	-1-
II. ARGUMENT	-3-
A. Usable Space	-3-
1. Pole Tops	-3-
2. Neutral Zone	-3-
B. Appurtenances	-8-
C. FAS 109	-10-
III. CONCLUSION	-11-

I. INTRODUCTION

On September 17, 1998, the Complainants filed their Initial Brief in this matter in support of their recommendation that the Department determine Massachusetts Electric's pole attachment rates at \$9.08 per solely owned pole and \$4.54 per jointly owned pole, effective as of February 1, 1998. In their Initial Brief, Complainants explained how their recommended attachment fees, supported by their rate expert Mr. Glist, are consistent with the FCC formula, as adopted and applied by the Department in *Cablevision of Boston*, D.P.U./D.T.E. 97-82 (April 15, 1998).

First, Complainants adopted the usable space method which the FCC continues to apply and which the Department adopted in *Cablevision of Boston*. Mr. Glist properly included the neutral zone and pole tops in usable space. Moreover, he explained why Massachusetts Electric's proposed exclusion of the neutral zone and pole tops from usable space constitutes a fundamental change in the FCC/Department approach to usable space-contrary to the Department's directives in *Cablevision of Boston*- and not a rebuttal of the FCC's usable space presumption.

(Complainants' Brief at 11-13). In order to illustrate this critical point, Mr. Glist calculated Massachusetts Electric's usable space at 12.82 feet based upon the type of statistical data from Massachusetts Electric's pole inventory that the FCC accepts as rebutting the 13.5 foot presumption. (Exhibit CABLE-1 at 26,27; Complainants' Brief at 13). For its part, Massachusetts Electric conceded that it had not complied with the usable space component of the FCC formula (Exhibit CABLE-17 at 2; Complainants' Brief at 15), which the Department accepted in *Cablevision of Boston*. The wide gulf between Complainants' recommendation and Massachusetts Electric's original, proposed rates (\$15.84 per solely owned pole and \$7.92 per jointly owned pole), which represented a 60% increase over current pole attachment fees, was

acknowledged by Massachusetts Electric during hearings as attributable primarily to the Company's noncompliance with usable space portion of the FCC's pole attachment rate formula (Exhibit CABLE-17 at 2).

Second, Complainants demonstrated that they have overcome the 15% appurtenances rebuttable presumption, as expressly permitted under the FCC formula, based upon detailed Account 364 appurtenance investment subaccount data provided by Massachusetts Electric. Mr. Glist's recommendation of an appurtenances adjustment of 26%, based on the record in this case, is fully consistent with both the FCC's approach and the Department's methodology in *Cablevision of Boston*, in which the 15% appurtenances adjustment rebuttable presumption was applied based on the record in that case. For its part, Massachusetts Electric muddled the record on this issue in an unsuccessful attempt to support its erroneous theory that the 15% appurtenance adjustment is not rebuttable. (Complainants' Brief at 35-37).

Third, Complainants explained the differences between Mr. Glist's calculation of carrying charges under the *Cablevision of Boston* and FCC approaches and the carrying charge methodologies used by Massachusetts Electric. (Complainants' Brief at 39-44). Finally, Complainants addressed issues related to pole counts arising out of Massachusetts Electric's changes in position during this proceeding. (Complainants' Brief at 37-39).

Complainants have addressed comprehensively in their Initial Brief each of the points which Massachusetts Electric raised in its Initial Brief. Consequently, it is unnecessary for Complainants to reargue those same points in this Reply Brief. Without waiving any arguments previously made, Complainants have addressed in this Reply Brief several legal and policy arguments which Massachusetts Electric has made in its continuing attempt to have this

Department ignore its recent decision in *Cablevision of Boston* in determining the pole attachment rates of Massachusetts Electric.

II. ARGUMENT

A. Usable Space

1. Pole Tops

Without reference to a single legal decision in support of its position, and without addressing the body of precedent that contradicts its position, Massachusetts Electric maintains that pole tops should be excluded from usable space. It claims that this exclusion is supported by the language of the Massachusetts Pole Attachment Statute. (MECo Brief at 6,7). Complainants have addressed Massachusetts Electric's position in their Initial Brief. (Complainants' Brief at 26-29). As a policy matter, the Department should continue to apply the pole attachment rate formula which it recently adopted in *Cablevision of Boston*, in which it declined to exclude pole tops from usable space. Reasoned consistency requires the application of the *Cablevision of Boston* approach in this proceeding.¹

2. Neutral Zone

Massachusetts Electric has continued to ignore the requirements established by the Department in *Cablevision of Boston* that it (1) adhere to the usable space approach employed by the FCC and (2) not base its proposed rates upon changes in that approach that may be under consideration by the FCC as a result of utility industry rulemaking requests. (MECo Brief at 7-12). During hearings, Massachusetts Electric admitted to its departure from the FCC's usable

¹ Even decisions of other Commissions which Massachusetts Electric appended to its Initial Brief include pole tops in usable space.

space approach (Exhibit CABLE-17 at 2) and thereby effectively conceded its noncompliance with the Department's directives in *Cablevision of Boston*. On brief, Massachusetts Electric has argued for exactly what the Department stated it would not consider - changes in the FCC formula that the utility industry has requested the FCC to adopt, but which remain pending in a rulemaking at the FCC. (MECo Brief at 12). Complainants have addressed these noncompliant aspects of Massachusetts Electric's rate proposal in their Initial Brief and need not reargue the point here. (Complainants' Brief at 15-18). As a matter of reasoned consistency, and for the legal and policy grounds discussed by the Complainants in their Initial Brief, the Department should adhere to its decision in *Cablevision of Boston* in determining the pole attachment rates of Massachusetts Electric.

Massachusetts Electric has argued that on one hand, the neutral zone is never part of usable space and, on the other, that its exclusion of the neutral zone overcomes the rebuttable presumption of 13.5 feet established by the FCC and adopted by the Department in *Cablevision of Boston*. (MECo Brief at 7-11). Massachusetts Electric is wrong on both counts. First, Complainants have explained that the exclusion of the neutral zone does not constitute a rebuttal of the 13.5 foot usable space presumption and instead represents a frontal assault on the usable space portion of the FCC/Department pole attachment rate formula. (Complainants' Brief at 16,17). Second, such an exclusion is fundamentally inconsistent with the usable space approach employed by the FCC and adopted recently by the Department.

In support of its position, Massachusetts Electric has relied upon actions taken in a handful of states, all the while conceding that "...other jurisdictions, for various reasons, [have] taken an approach more akin to that suggested by Complainants...." (MECo Brief at 7-11). Of

critical importance to this case is that one of the “other jurisdictions” is Massachusetts!

Moreover, Massachusetts Electric chose not to address directly the more recent state and federal decisions and legislative determinations which support the Department’s position in *Cablevision of Boston* regarding usable space.² When combined with the FCC’s approach (which covers 31 states) and the approach taken by other states, the *Cablevision of Boston* decision’s treatment of usable space is widely accepted and supported by the weight of authority at state and federal levels.

Furthermore, on close examination of the authorities relied upon by Massachusetts Electric, the Department should find that they do not support Massachusetts Electric’s position. First, in two instances of claimed support for its position (Illinois and Michigan), Massachusetts Electric relies upon dissents. (MECo Brief at 11,12). These dissents do not represent the decisions of the public service commissions. Second, the Company’s reliance upon authority from Maine is misplaced and misleading. The Maine Public Utilities Commission adopted a rate formula under a state statute, 35-A M.R.S. § 711, as amended by St. 1991, c. 708, § 1, which specifically did not adopt or require adoption of any components of the FCC formula. In actual application, moreover, the Maine formula has offsetting adjustments which Massachusetts Electric failed to mention. For example, Massachusetts Electric failed to explain that in Maine (1) the rate base is not calculated as total investment over total poles, but is reduced to estimate the cost for a

² *Cal. Pub Util. Code 767.5 (1996). In the Matter of Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues, N.Y. Public Service Comm’n. Case No. 95-C-0341 (issued and effective June 17, 1997). Consumers Power Co., et als, Mich. Pub. Serv. Comm’n Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), rehearing denied (April 24, 1997). Ohio Edison Co., et al., No. 81-1171-EL-AIR (Ohio Pub. Serv. Comm’n Nov. 3, 1982). Application of Southern New England Telephone Co. To Amend Its Rates and Rate Structure, 1993 Conn. PUC LEXIS 5 (July 7, 1993)(assigning neutral zone to usable space).*

shorter pole; and (2) the Maine Commission may alter the amount of usable space to include all space where streetlighting, transformers and other attachments are placed by the electric utility.³ See, Chapter 880, *Maine Public Utilities Commission Regulations*. As a result, not one rate in Maine rises to the excessive level proposed by Massachusetts Electric.⁴ Massachusetts Electric has distorted the Maine approach by cherry-picking from it a single element in order to create in Massachusetts a pole rate that would be inconsistent with pole rates in Maine.

Similarly, the 1982 decision of the Kentucky Public Service Commission is not controlling or even persuasive here. In contrast to the situation in Massachusetts, where the Department derives its authority under a specific state statute with a “usable space” formulation consistent with that followed by the FCC, the Kentucky Commission acted without any similar statutory parameter. *Kentucky CATV Association v. Volz*, 675 S.W.2d 393 (Ky. App.1983). Reliance by this Department upon the Kentucky Commission decision would be inconsistent with and conflict with the decisional principles adopted by the Department in *Cablevision of Boston*, decided only a few months ago.

The 1981 decision of the Wisconsin Public Service Commission is also unpersuasive.

³ This point demonstrates why reasoned consistency requires the continued application of *Cablevision of Boston*. Attachers cannot be required to adhere to Department precedent and then be deprived of a reasonable opportunity to create the type of record that would be appropriate if that precedent were to be suddenly changed. *New England Telephone and Telegraph Company v. Department of Public Utilities*, 371 Mass. 67 (1976). (When a major change in a regulatory standard is in prospect in a rate proceeding, there should be sufficient warning to enable parties to adjust their practices and proof to the new situations).

⁴ The Department may take notice of or incorporate by reference in this docket the national survey of pole attachment rates which was admitted into the record in *Cablevision of Boston* as PG-13 to Exhibit CABLE-1. Per that survey, Bangor Hydro’s solely owned pole rate is \$9.50, Maine Public Service Co.’s is \$7.78 and a solely owned Central Maine Power pole used by Bell Atlantic, cable and the utility is \$6.62.

Massachusetts Electric has failed to disclose (and may be unaware) that Wisconsin is not a “certified” state which regulates pole attachments. A court reversed the Wisconsin Public Service Commission’s rule on March 8, 1982, and jurisdiction over pole attachments in Wisconsin has since been with the FCC. *FCC Public Notice, Mimeo 3094 (March 31, 1982)* (removing Wisconsin from the list of certified states); *States that Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498; 1992 FCC LEXIS 931 (February 21, 1992) (Wisconsin not among currently certified states). Even if the Department were to take the Wisconsin decision into account, that decision is unpersuasive and does not afford the basis for a change in Department precedent. It was made without any input or participation by the Wisconsin Cable Communications Association, which had asked that pole attachment fee issues be dealt with outside of a pending utility rate case so that it could present an industry position on those issues. The Wisconsin Commission’s terse discussion of the entire pole rate formula in one paragraph does not afford a reasoned basis for the Department to reverse the *Cablevision of Boston* decision.

In sum, Massachusetts Electric’s reliance upon out of state authority in support of its position on usable space- a position that conflicts with the FCC formula adopted by the Department in *Cablevision of Boston*- is misplaced and should be disregarded by the Department.

B. Appurtenances

On brief, Massachusetts Electric argued incorrectly that *Cablevision of Boston* has transformed the the FCC’s 15% rebuttable presumption for appurtenances into an irrefutable presumption. (MECo Brief at 3-5). The Company also mischaracterized Mr. Glist’s rebuttal of

that presumption-in accordance with the more conservative of two methods recognized by the FCC- as “an approach different from the Department’s.” (MECo Brief at 4). Finally, as anticipated and addressed by the Complainants (Complainants’ Brief at 35-37), Massachusetts Electric has relied upon its counsel’s self-styled calculation- wholly inconsistent with the FCC’s approaches, not backed by any legal authority and not sponsored by its witnesses- to confuse the record and support its contention that a 15% adjustment for appurtenances is not rebuttable. (MECo Brief at 5).

Complainants provided the Department with authority that the 15% appurtenance adjustment used by the FCC and employed in *Cablevision of Boston* is a rebuttable presumption that is subject to modification when a party presents Account 364 investment subaccount data that identifies the subaccount investment for each type of appurtenance. (Complainants’ Brief at 32-35). In this case, Massachusetts Electric submitted this detailed subaccount investment data with its pole attachment rate support, which formed the evidentiary basis for Mr. Glist’s recommendation. That level of detail was not presented in *Cablevision of Boston*.⁵ By recognizing that the 15% appurtenance adjustment is based upon a rebuttable presumption and not an irrefutable presumption, Complainants have correctly applied *Cablevision of Boston* in this case.

Moreover, contrary to Massachusetts Electric’s unsupported assertion, Complainants’

⁵ Complainants request that the Department incorporate by reference pages 26 and 27 of Mr. Glist’s testimony in *Cablevision of Boston*, where he stated that because Boston Edison had not provided a breakdown of Account 364 investment, the 15% rebuttable presumption was used. A copy of these pages to that testimony is attached for the convenience of the Department and the parties. The Department also should note that at no time did Boston Edison argue that the 15% presumption could not be rebutted under the FCC formula.

application of the more conservative of two FCC methodologies by which the 15% appurtenance adjustment may be rebutted does not represent an approach different from the Department's. Rather, it represents the proper application of the Department's decisional principle in *Cablevision of Boston* that the 15% adjustment for appurtenances may be rebutted based upon the type of evidentiary record accepted by the FCC and presented here by Mr. Glist.

Finally, the Department should reject Massachusetts Electric's attempt to alter its pole attachment rate formula by transforming the 15% rebuttable presumption into an irrefutable presumption. As explained previously by the Complainants, that attempt is both legally incorrect and inequitable to pole attachers based upon uncontradicted evidence that under the FCC's alternate methods of making adjustments for appurtenances, the adjustment should range between 26% - 40%. (Complainants' Brief at 32-35).⁶

C. FAS 109

Complainants have addressed fully Massachusetts Electric's inclusion of a FAS 109 adjustment in an attempt to further modify the pole attachment rate formula adopted by the FCC and applied by the Department. (Complainants' Brief at 39-42). Massachusetts Electric incorrectly posits on brief that its FAS 109 adjustment-admittedly not recognized under the FCC

⁶ Mr. Glist's approach to this appurtenance issue is not "subject to debate," as Massachusetts Electric claims. (MECo Br. at 4, note 3). Massachusetts Electric has incorrectly argued in a footnote that pole pins should be treated as usable by cable attachers, rather than excluded as an appurtenance, on the theory that pole pins permit sufficient clearance among wires to optimize pole locations. There is no FCC or other legal authority to support this position. If it were correct that anything which increases line separation among electrical conductors is usable to cable attachers, then crossarms would not be excludable as appurtenances. The FCC excludes pole top pins, crossarms and other appurtenances. Had Mr. Clapp, the sponsor of this theory in live testimony, reviewed FCC authority on this subject (which he admitted he had not), he would have realized that this theory is inconsistent with the very definition of appurtenances.

formula- “does not affect rates.” (MECo Brief at 6). This adjustment most certainly does affect rates- it raises pole attachment rates. The Department should reject Massachusetts Electric’s invitation to head down the slippery slope of selective modifications to the FCC formula applied in *Cablevision of Boston*. Such action would be contrary to the Department’s objective of implementing a simple, predictable and self-executing pole rate formula that avoids the need for mini rate cases when pole attachment rates are determined. (Complainants’ Brief at 42).

III. CONCLUSION

For the reasons stated in their Initial Brief and this Reply Brief, Complainants request that the Department determine Massachusetts Electric's pole attachment rates to be \$9.08 per solely owned pole and \$4.52 per jointly owned pole, effective as of February 1, 1998.

Respectfully submitted,

A-R CABLE SERVICES, INC., ET ALS

By their attorneys,

William D. Durand
Executive Vice President and Chief Counsel
New England Cable Television Association, Inc.
100 Grandview Road
Braintree, MA 02184
(781) 843-3418

Alan D. Mandl
Ottenberg, Dunkless, Mandl & Mandl LLP
260 Franklin Street
Boston, MA 02110
(617) 261-6566

Dated: October 5, 1998

A:\DTE98-52reply-brief.wpd

